IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-- 725

GEORGE HUNT PEACOCK,

Appellant

v.

STATE OF NORTH CAROLINA,

Appellee

ON APPEAL FROM A DECISION OF THE SUPREME COURT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

INTRODUCTION

This is an appeal from a final judgment of the Supreme Court of North Carolina filed on August 30, 1977. The appellant submits this jurisdictional statement to show that this Court has jurisdiction of the appeal, and that a substantial federal question is presented.

OPINION BELOW

The opinion below by the Supreme Court of North Carolina is reported at 293 N.C. 257, 237 S.E.2d 538 (1977). A copy of the opinion is set out in full in Appendix B. The opinion below by the Honorable Judge Martin of the North Carolina Court of Appeals is reported at 33 N.C. App. 637, 235 S.E.2d 798(1977). A copy of the opinion is set out in full in Appendix A.

JURISDICTION

The suit arises out of the arrest and conviction of the appellant under North Carolina General Statutes § 20-138 (1973), for driving under the influence of intoxicating liquor. Specifically, this appeal concerns the constitutional adequacy of the warning required to be given under N.C.G.S. § 20-16.2(a) (Supp. 1975). Appellant Peacock was convicted of driving under the influence of intoxicating liquor in the Superior Court of Dare County, North Carolina, on September 17, 1976. The conviction was affirmed by the North Carolina Court of Appeals on June 15, 1977. Peacock brought an appeal and a petition for discretionary review in the Supreme Court of North Carolina. The appeal was dismissed ex mero motu

and the petition for discretionary review was denied in a judgment issued on August 30, 1977. Notice of Appeal was filed with the North Carolina Supreme Court on November 10, 1977.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257(2) (1970). Appellant contends that N.C.G.S. § 20-16.2(a) (Supp. 1975), both on its face and as applied, violates the Constitution of the United States. The North Carolina courts have sustained the validity of the statute. Under these circumstances, the jurisdiction of this court is properly invoked by appeal. Huffman v. Pursue, Ltd., 420 U.S. 592, reh. denied, 421 U.S. 971 (1975); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

STATUTE INVOLVED

The case involves the validity of N.C. Gen. Stats. § 20-16.2 (Supp. 1975). This statute is set out in Appendix C.

QUESTION PRESENTED

The question presented by this appeal is whether, under the due process clause of the fourteenth amendment to the United States Constitution, a warning given by a state police officer to a non-resident motorist to the effect that failure to submit to a blood alcohol test "will result in revocation of his driving privilege for six months" is void for failing to advise the motorist that the revocation will apply only to his driving privileges in the arresting state.

STATEMENT OF THE CASE

On April 7, 1976, Appellant George Hunt Peacock, a Virginia resident, was arrested while driving in Dare County, North Carolina, and charged with driving under the influence of intoxicating liquor, in violation of N.C. Gen. Stats. § 20-138 (1973). Subsequently, he was taken before Trooper C.A. Edwards of the North Carolina State Highway Patrol, and asked to submit to a breathalyzer test to determine his blood alcohol content (Record on Appeal at 4, hereinafter cited as "R"). Trooper Edwards informed Peacock, both verbally and in writing, of his rights with respect to the breathalyzer under N.C.G.S. § 20-16.2(a) (Supp. 1975). The warning given read as follows:

> YOU HAVE BEEN ARRESTED AND CHARGED WITH DRIVING OR

> OPERATING A MOTOR VEHICLE UPON A PUBLIC HIGHWAY OR PUBLIC VEHICULAR AREA WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR. IN MY PRESENCE THE ARRESTING OFFICER REQUESTED YOU TO SUBMIT TO A CHEMICAL TEST TO DETERMINE THE ALCOHOLIC CONTENT OF YOUR BLOOD, BUT IT IS FIRST REQUIRED THAT YOU BE VERBALLY AND IN WRITING INFORMED OF YOUR RIGHTS AND FURNISHED WITH THIS SIGNED DOCUMENT SETTING FORTH YOUR RIGHTS, WHICH ARE AS FOLLOWS:
>
> 1. You have a right to refuse to take the test.
>
> 2. Refusal to take the test will result in revocation of your driving privileges for six months.
>
> 3. You may have a physician, qualified technician, chemist, registered nurse or other

qualified person of your own choosing administer a chemical test or tests in addition to any administered at the direction of the law enforcement officer.

4. You have the right to call an attorney and select a witness to view for you the testing procedures, but the test shall not be delayed for this purpose for a period in excess of 30 minutes from the time you are notified of your rights.

You have now been informed of your rights verbally and in writing, and a signed copy of the foregoing document has been furnished to you.

(R. 7-8). Peacock signed the form. When the test was administered, Peacock's blood alcohol content was found to be in excess of that permitted by law. At the May 28, 1976, Criminal Session of

Dare County District Court, Peacock was found guilty as charged, and noted his appeal to the Supreme Court of Dare County.

A trial de novo was held in the Superior Court on September 17, 1976. Trooper Edwards testified that he read Peacock his rights and that Peacock signed the form on which the rights were printed (R. 6). He also testified that Peacock asked what would happen to his Virginia driver's license. Edwards told Peacock that he did not know "what action the Division of Motor Vehicles in Richmond would take" (R. 6); he testified that he was not familiar with Virginia laws in that respect at the time. (R. 6). Edwards also testified that Peacock never asked to call an attorney or to select a witness to view the test, and that he

gave Peacock a copy of the test results. (R. 7). On cross-examination, Edwards stated that he observed Peacock for twenty minutes in the breathalyzer room, and he again said that Peacock did not make a telephone call in his presence. (R. 9).

On direct examination, Appellant Peacock stated that at the time he was arrested, he understood the warning to the effect that "refusal to take the test will result in revocation of your driving privileges for six months" to mean that he would lose his privileges everywhere, including his home state of Virginia. He testified that if he had known that the revocation would apply only to his North Carolina privileges, he would have refused to take the test, and that he would not have consented to waive his

right to refuse to take the test. (R. 10). He also testified, contrary to Edwards' statements, that he did make a telephone call for assistance before taking the breathalyzer test, and stated that he thought Edwards was working on the machine at that time. (R. 10). He also said that he was unable to complete his phone call before being asked to take the test, and that he took the test when asked to do so because of his fear that he would lose his license if he did not cooperate. (R. 11). On cross-examination, Peacock testified that if he had known that refusal to take the test would only cause the loss of his North Carolina driving privileges, he would have refused to take the test "under any circumstances." (R. 12).

At the conclusion of the evidence,

counsel for Peacock moved to strike the results of the breathalyzer test results. The motion was denied, and exception was noted. (R. 14). Peacock submitted requested findings of fact (R. 14-15), which included, inter alia, findings that Peacock understood that he risked losing his driving privileges everywhere by refusing to take the test, and that he would not have waived his right to refuse to take the test if he had known the limits of the revocation of his driving privileges. The court refused the requested findings. Exceptions were taken to this refusal.

On appeal to the North Carolina Court of Appeals, Appellant Peacock argued that the waiver of his rights under N.C.G.S. § 20-16.2 was not knowing, voluntary, and intelligent because he

was not told of the limits of the state's power to revoke his driving privileges. He also argued that, as a non-resident motorist, he was denied due process because the ambiguous language of § 20-16.2(a)(2) apparently meant that North Carolina could revoke his general privilege to drive anywhere. The North Carolina Court of Appeals rejected these arguments without comment in its opinion of June 15, 1977 (Appendix A), and the Supreme Court of North Carolina denied discretionary review. (Appendix B). Thus, the constitutionality of the warning structure of § 20.16.2(a) was upheld.

ARGUMENT

N.C. GEN. STATS. § 20-16.2(a) DENIES DUE PROCESS TO A NON-RESIDENT MOTORIST BY IMPLYING

THAT REFUSAL TO SUBMIT TO A CHEMICAL TEST FOR BLOOD ALCOHOL CONTENT WILL RESULT IN REVOCATION OF THE MOTORIST'S PRIVILEGE TO DRIVE, BOTH IN NORTH CAROLINA AND IN OTHER JURISDICTIONS.

Appellant Peacock respectfully submits that the present statutory statement of the consequences of refusing to take a breathalyzer test, as applied to him in the present situation, violates the fundamental fairness standard of the due process clause of the fourteenth amendment to the United States Constitution. Once a legislature has undertaken to provide statutory rights and a statement of the consequences of exercising such rights, it should be required to do so clearly, accurately and completely. Due process requires that men of common intelligence not be forced to guess at the meaning of the criminal law. Smith

v. Goguen, 415 U.S. 566 (1974). A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application violates due process. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305, cert. allowed, 285 N.C. 758, 209 S.E.2d 279 (1974); see also State v. Graham, 32 N.C. App. 601, 233 S.E.2d 615 (1977).

Under these standards, § 20-16.2 (a)(2) appears ambiguous, incomplete, and misleading in its application to non-resident motorists. Had Peacock known that his refusal to take the breathalyzer test would have resulted only in the loss of his North Carolina driving privileges, he would have exercised his right to refuse the test. (R. 10). The North Carolina General

Assembly could have prevented this ambiguity by adding the words "North Carolina" to the statement in § 20-16.2(a)(2), so that it would have read "refusal to take the test will result in revocation of your North Carolina driving privilege for six (6) months." Residents and non-residents would thereby be clearly informed of the consequences of refusing to take the breathalyzer test. This was not done, however, and the resulting ambiguity misleads the non-resident, and also requires the non-resident motorist to guess at the ramifications of his actions.

As to a North Carolina resident, § 20-16.2(a)(2) is clear and accurate because the driving privilege to which the language refers is his North Carolina privilege. This clarity does not exist for a non-resident, however, whose per-

ception and focus will be on his driving privileges in his state of residence. Thus, a non-resident can draw a reasonable conclusion from the statutory language that the revocation will apply in North Carolina and his state of residence. Because this statutorily created inference is erroneous, Peacock respectfully contends that the statute violates the standard of fundamental fairness. The statute implies that the state has the power to extend the consequences of exercising a statutory right (the consequences being in the nature of a penalty) beyond its jurisdictional boundaries. Where the statute appears to have a broader scope than it actually has, citizens are endangered by having to guess at its meaning. Further, the coercive effect of the statute becomes apparent when a person

such as the present appellant, upon learning of the actual scope of the statute, states that he would not have taken the breath test had he known the true nature of the statute.

The North Carolina courts have followed this approach in holding that a defendant must be fully advised of his rights under § 20-16.2(a). In State v. Fuller, 24 N.C. App. 38, 209 S.E.2d 805 (1974), the record failed to show that the defendant was advised of his right to have an additional breathalyzer test administered by a qualified person of his own choosing. In holding that the test administered was inadmissible, in the defendant's trial for drunk driving, the court stated:

> [W]e must agree. . . that the General Assembly now requires that a defendant in a situation

> such as the one presented by this case must be advised of the rights set out in G.S. § 20-16.2 by the "person authorized" to give the test. If the failure to give them is not going to preclude the admission in evidence of the test results, the General Assembly must delete the requirement.

209 S.E.2d at 808.

In Veilleux v. Springer, 131 Vt. 33, 300 A.2d 620 (1973), plaintiff challenged the constitutionality of Vermont's implied consent statute. The statute imposed a six month driver's license suspension on those who withdrew their consent to take a blood alcohol test and entered a plea of not guilty in a subsequent criminal proceeding; however, no such suspension was imposed on those who withdrew their consent and then

pleaded guilty in the later action. Holding that the statute violated federal due process and equal protection guarantees, the court stated:

> [T]he imposition of the six month suspension upon only those who plead not guilty . . . cannot be justified by the compelling state interest of providing a statutory scheme for the detection of the alcoholic content in the body fluids of a vehicle operator because of all those who withdraw their consent to take the chemical test provided for such detection, only those who exercise their fundamental right to maintain their innocence to a criminal charge suffer the six month license suspension.

300 A.2d at 625. The effect of the statute in Veilleux, as of that in the instant case, was coercive. Under the Vermont

scheme, a defendant was discouraged from pleading not guilty after refusing a blood test by the fact that he would nevertheless lose his driver's license. Here, Appellant Peacock was encouraged and effectively required to take the test because of his reasonable assumption from the warnings given that he would lose his driving privilege everywhere. The coercive effect of statutes such as § 20-16.2(a) should not be underestimated; the Supreme Court of Minnesota, for example, has recently ruled that a motorist subject to a breath test is entitled, constitutionally and statutorily, to consult with counsel before taking the test, and that even if the motorist takes the test without consulting counsel, the results should be suppressed if he were not advised of his right to an attorney.

Prideaux v. State, Department of Public Safety, 247 N.W.2d 385 (Minn. 1976).

Other courts have followed the rule that where motorists are entitled to warnings with respect to breathalyzer tests and the like, the warnings must be full in order to be statutorily or constitutionally sufficient. In State v. Hraha, 193 N.W.2d 484 (Iowa 1972), the statute provided that a breath test could only be administered by a peace officer at the written request of that officer. The evidence showed that the defendant consented to the test, but that the test was not administered by a peace officer. In holding that the results of the test should not have been admitted, the court stated:

> There can be no doubt a statutory right may be effectively waived. However, such analogy does not help the State here since it must be shown that such waiver was voluntary, free from duress and intelligently given and not merely a submission to authority.

193 N.W.2d at 489-90. There was no evidence that the defendant had made such a waiver. Id. at 490.

In Harrington v. Tofany, 59 Misc. 2d 197, 298 N.Y.S.2d 283 (Sup. Ct. 1969), the arresting officer failed to warn the defendant that refusal to submit to a breath test would cause the revocation of his license, whether or not he was convicted of driving while intoxicated. The court held that the failure to warn fully was "fatal." and therefore, that the defendant's license could not be revoked. 298 N.Y.S.2d at 286. Accord, Ferreri v. Tofany, 60 Misc. 2d 534, 303 N.Y.S.2d 137 (Sup. Ct. 1969).

In conclusion, the Appellant Peacock respectfully submits that the language of the warning required by §20-16.2(a) is so vague and amibiguous as to deny him due process. Peacock could not know of the limits of the authority of North Carolina without being fully advised that that State had only the power to revoke his North Carolina driving privileges. Thus, the vague statute resulted in a waiver of rights which was not knowingly, intelligently or voluntarily made.

CONCLUSION

The North Carolina statute has been construed by the North Carolina state courts in such a way as to deny the Appellant due process of law as guaranteed by the fourteenth amendment to

the United States Constitution. It is respectfully submitted that this Court should grant this appeal, and review and reverse the decision below.

Respectfully submitted,

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APPENDIX A

No. 771SC21

NORTH CAROLINA COURT OF APPEALS

Filed: 15 June 1977

STATE OF NORTH CAROLINA

v. Dare County
No. 76CR865

GEORGE HUNT PEACOCK

Appeal by defendant from McConnell, Judge. Judgment entered 17 September 1976 in Superior Court, Dare County. Heard in the Court of Appeals 31 May 1977.

Defendant, a Virginia r sident, was charged with driving while under the influence of intoxicating liquor and for transporting in the passenger area of a motor vehicle a container of alcoholic beverages with a broken seal. He was found guilty as charged in district court. Upon appeal to the superior court, defendant filed a motion to suppress the

results of a breathalyzer test. At the hearing on the motion the parties stipulated that defendant was arrested at 4:15 p.m. on 17 April 1976 for driving under the influence of intoxicating liquor, taken before a licensed breathalyzer operator at 4:50 p.m., informed of his rights pursuant to G.S. 20-16.2(a) both verbally and in writing, and observed by the breathalyzer operator for twenty minutes prior to the administration of the test. Trooper Edwards, the breathalyzer operator, testified for the State that after informing defendant of his breathalyzer rights he asked defendant if he understood them and defendant said he did and then signed a written copy of his rights. Defendant at no time asked to call an attorney or select a witness to view the testing procedure. The test

was administered after a twenty minute waiting period during which defendant remained in the presence of Trooper Edwards. Defendant registered a blood alcohol level of twenty-three hundredths of one percent.

The trial court denied defendant's motion to suppress the breathalyzer results. Defendant then pleaded guilty and was sentenced to sixty days, suspended upon compliance with certain conditions.

Defendant appeals from the denial of his motion to suppress.

Attorney General Edmisten, by Associate Attorney David D. Ward, and Deputy Attorney General William W. Melvin, for the State.

Leroy, Wells, Shaw, Hornthal, Riley & Shearin, by John G. Gaw, Jr., for the defendant.

MARTIN, Judge.

In his first assignment of error, defendant contends that the breathalyzer results should have been suppressed. He argues that absent an affirmative, specific, and express waiver of the right to counsel provided by G.S. 20-16.2(a) breathalyzer test results are not admissible unless the breathalyzer operator waits thirty minutes from the time a defendant is notified of his breathalyzer rights to administer the test. Defendant cites State v. Shadding, 17 N.C. App. 279, 194 S.E. 2d 55 (1973), for the proposition that where a person is advised of his rights under G.S. 20-16.2(a) and does not waive them, then the results of the test are admissible only if the testing was delayed, not to exceed thirty minutes, to give the defendant an opportunity to exercise his rights.

At the hearing to determine the admissibility of the breathalyzer results in the case at bar, the trial court made findings of fact that the defendant was brought to the police station and advised of his rights under G.S. 20-16.2(a) both verbally and in writing at 4:50 p.m.; that he understood his rights; that he did not request additional time to call an attorney or select a witness to view the testing procedure; and that the breathalyzer operator waited twenty minutes before administering the test at 5:10 p.m. Defendant contends that since no waiver was made by the defendant, the police had to wait thirty minutes before administering the test. We disagree. This assignment of error is controlled by the recent opinion of Chief Judge Brock in State v. Lloyd, ___N.C. App. ___, ___S.E.2d ___(filed 1 June 1977), and we see no reason to

further clarify this Court's position.

We have reviewed defendant's remaining assignments of error and find them to be without merit.

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

Report per Rule 30(e).

APPENDIX B

No. 200PC FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1977

****

STATE OF NORTH CAROLINA)
) JUDGMENT DISMISSED
v.) APPEAL EX MERO
) MOTU AND DENYING
GEORGE HUNT PEACOCK) PETITION FOR DIS-
) CRETIONARY REVIEW
)
) (771SC21)

****

This matter came on to be considered upon notice of appeal from the North Carolina Court of Appeals pursuant to G.S. 7A-30 and a petition for discretionary review pursuant to G.S. 7A-31; upon consideration whereof, it is adjudged by the Court in conference, this 23rd day of August 1977 that the petition for discretionary review be denied, that the appeal be dismissed ex mero motu, and that it be so certified to the North Carolina Court

of Appeals to the intent that its decision be affirmed.

It is considered and adjudged further that defendant do pay the costs incurred, to wit: the sum of NINE AND NO/100 DOLLARS ($9.00).

Issued under my hand and the seal of the Supreme Court this 30 day of August 1977.

_____

John R. Morgan
Clerk of the Supreme
Court of North
Carolina

cc: North Carolina Court of Appeals
LeRoy, Wells, Shaw, Hornthal,
Riley & Shearin, P.A.
Mr. David D. Ward, Associate Attorney
Mr. Thomas S. Watts, District
Attorney
Mr. D.S. Meekins, Clerk of Superior
Court

APPENDIX C

§ 20-16.2. Mandatory revocation of license in event of refusal to submit to chemical tests.—(a) Any person who drives or operates a motor vehicle upon any highway or any public vehicular area shall be deemed to have given consent, subject to the provisions of G.S. 20-139.1, to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or operating a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered at the request of a law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public

vehicular area while under the influence of intoxicating liquor. The law-enforcement officer shall designate which of the aforesaid tests shall be administered. The person arrested shall forthwith be taken before a person authorized to administer a chemical test and this person shall inform the person arrested both verbally and in writing and shall furnish the person a signed document setting out:

(1) That he has a right to refuse to take the test;
(2) That refusal to take the test will result in revocation of his driving privilege for six months;
(3) That he may have a physician, qualified technician, chemist, registered nurse or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of the law-

enforcement officer; and

(4) That he has the right to call an attorney and select a witness to view for him the testing procedures; but that the test shall not be delayed for this purpose for a period in excess of 30 minutes from the time he is notified of his rights.

. . . .

§ 20-16.2. Mandatory revocation of license in event of refusal to submit to chemical tests.(1975 Supplement).

(c) The arresting officer, in the presence of the person authorized to administer a chemical test, shall request that the person arrested submit to a test described in subsection (a). If the person arrested willfully refuses to submit to the chemical test designated by the arresting officer, none shall be given. However, upon the receipt of a sworn

report of the arresting officer and the person authorized to administer a chemical test that the person arrested, after being advised of his rights as set forth in subsection (a), willfully refused to submit to the test upon the request of the officer, the Division shall revoke the driving privilege of the person arrested for a period of six months. . . .

APPENDIX D

No. 200PC FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1977

****

STATE OF NORTH CAROLINA)
)NOTICE OF APPEAL
v.)TO THE SUPREME
)COURT OF THE
GEORGE HUNT PEACOCK)UNITED STATES
)
) (771SC321)

****

Notice is hereby given that George Hunt Peacock, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of North Carolina affirming the judgment of conviction and the denial of Appellant's motion to suppress evidence, entered herein on August 23, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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CERTIFICATE OF SERVICE

I, John G. Gaw, Jr., attorney for George Hunt Peacock, Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 10th day of November, 1977, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States, on the State of North Carolina, by mailing a copy, in a duly addressed envelope, with a first class postage pre-paid, to Rufus L. Edmisten, Attorney General for the State of North Carolina,

and William W. Melvin, Deputy Attorney General for the State of North Carolina, at the offices of the North Carolina Attorney General, Post Office Box 629, Raleigh, North Carolina 27602.

John G. Gaw, Jr.
Attorney for George Hunt Peacock,
Appellant
Leroy, Wells, Shaw, Hornthal, Riley & Shearin, P.A.
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Kitty Hawk, North Carolina 27949
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 1977, three copies of this Jurisdictional Statement were mailed, postage prepaid, to William W. Melvin, Deputy Attorney General, and to Rufus L. Edmisten, Attorney General of the State of North Carolina, at the offices of the North Carolina Attorney General, Department of Justice, Post Office Box 629, Raleigh, North Carolina, 27602. I further certify that all parties required to be served have been served.

John G. Gaw, Jr.